

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6190, 6195

To be argued by
JANIS G. SCHULMEISTERS

United States Court of Appeals FOR THE SECOND CIRCUIT Docket Nos. 77-6190, 77-6195

In the Matter
of the
Complaint of TUG OCEAN PRINCE, INC., and RED STAR TOWING
& TRANSPORTATION CO., as Owner and Charterer of the
Tug "OCEAN PRINCE", for Exoneration from or Limitation of
Liability,

*Plaintiffs-Third-Party Plaintiffs-
Appellees-Cross-Appellants,*

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

PITTSBURGH MARINE TRANSPORT CORP.,
Defendant-Appellee,
TUG OCEAN PRINCE, INC., and RED STAR TOWING &
TRANSPORTATION CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF UNITED STATES ANSWERING THE CROSS- APPEAL OF TUG OCEAN PRINCE, INC. AND RED STAR TOWING & TRANSPORTATION CO.

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UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

PITTSTON MARINE TRANSPORT CORP.,
Defendant-Appellee,

TUG OCEAN PRINCE, INC., and RED STAR TOWING &
TRANSPORTATION Co.,
Defendants-Appellees.

**BRIEF OF UNITED STATES ANSWERING THE CROSS-
APPEAL OF TUG OCEAN PRINCE, INC. AND RED
STAR TOWING & TRANSPORTATION CO.**

Statement

In this brief we answer the appeal by Tug Ocean Prince, Inc. and Red Star Towing & Transportation Company (Red Star) against the United States. Red Star seeks reversal of the dismissal of its claim over against

the United States. This is the second issue stated on page 3 of the Government's appeal brief filed heretofore on March 3, 1975.

We are not answering Pittston's appeal against Red Star other than noting that we believe the District Court erred in permitting Red Star to limit liability under 46 U.S.C. § 183, et seq.*

Facts

As we stated on page 4 of our main brief, we accept the District Court's numbered findings of fact except where they are inconsistent or where the opinion of the District Court draws conclusions that, we submit, are inappropriate. As the District Court's findings are quite extensive and portions of the facts have been stated by the parties in the various briefs we shall not restate the facts, except by references in the argument.

Counterstatement of the Issue

In framing the issues and arguing its appeal against the United States, Red Star omits mention of the following findings of the District Court:

- a) The rock is to the left or "west of the navigable channel" (F 28; 20a; Wortman 751a-754a; Chart Ex. 4).
- b) "The can buoy is the best practical floating aid for the site, available under present technology. A fixed tower * * * would be damaged or destroyed by ice" (F 54; Glass T 469, 549a-550a, 575a-576a, 602a; Hallock 420a-482a).

* We realize that Pittston's success would increase the amount of Red Star's claim against the United States.

- c) The Light List and Coast Pilot (Exs. 2 and 3) specifically warn the mariner not to rely solely on buoys (F 37, 40). That in winter buoy 25 is an unlighted can (F 41); that during the ice season "aids to navigation are covered or dragged off station by ice" (F 42); that there is a tendency to set toward the rock during ebb tide (F 44); that Reimer was unfamiliar with these warnings as he "did not examine the Light List and the Coast Pilot very carefully" (F 37; Reimer 175a-176a); that Reimer "had never before navigated the Hudson River" (F 16); that Red Star "knew that Reimer lacked familiarity with the Hudson" (F 20); that "Reimer had not attended any navigation school" (F 27);* and that "Reimer failed to post a lookout when conditions were such that same was required" (F 38).

It also ignores testimony of its own experienced navigator, Kiernan, that he does not consider the area "a bad spot in the river" (Kiernan 437a-438a).

Thus, the real issue is whether the District Court properly dismissed Red Star's claim over against the United States because of Reimer's total lack of local knowledge and experience which resulted in the grossly negligent navigation, within Red Star's privity.

Contentions

1. The District Court properly found that the casualty was solely caused by Reimer's inexperience and negligence.

* He did not know what a danger bearing is (Reimer 197a; Cf. Ex. BB and Glass 594a).

2. We also contend that this occurred because of Red Star's complete disregard of the potential dangers, the hazards to be encountered and the potential for a pollution disaster; all of it was done knowingly so that it amounts to willful misconduct because the manner clearly implies reckless disregard of the probable consequences.

I.

The can buoy was the best available floating aid, adequate for the purposes it was placed and the Government was not negligent. The proximate and the only causes of the casualty were the gross negligence of Red Star and the resultant negligent navigation of the flotilla by Reimer.

The enabling statute authorizing the Coast Guard to establish aids to navigation, 14 U.S.C. § 81, provides that:

"* * * the Coast Guard *may* establish, maintain and operate:

- (1) aids to maritime navigation required to serve the needs of the Armed Forces or of the commerce of the United States * * *
- [Emphasis supplied.]

The discretionary nature of this statute was stated by Justice Frankfurter in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) at page 69:

"The Coast Guard need not undertake the light-house service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished,

then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning."

While it remains the leading case concerning aids to navigation, we respectfully point out that when the case was tried on the merits, the Government was exonerated because the stranding there occurred because the mate was completely unfamiliar with the area and the basic principles of navigation, *Indian Towing Co. v. United States*, 182 F. Supp. 264 (E.D. La. 1959), aff'd. 276 F.2d 300, cert. den., 364 U.S. 821 (1960),—a situation similar to the case at bar, as Reimer was completely unfamiliar with the river, had no formal training in navigation or use of radar and was unfamiliar with and ignored every warning and every principle of good seamanship, winding up outside and to the left of the channel (see Reimer 154a-155a, 163a-171a, 175a-176a, see 184a-185a; Cf. Glass 605a-608a).

Red Star's other quotation from *Indian Towing*, *supra*, at page 20 of its brief about induced reliance, we submit, is not applicable here. The Coast Pilot clearly warns that on the Hudson River between Tappan Zee and Albany aids to navigation are covered or dragged off station by moving ice (Ex. 3; F 42).

It also warns that pilotage is compulsory for foreign vessels and vessels under register, on top of which New York State statute requires pilotage for vessels over 300 gross tons (Ex. 3, p. 235; McKinney's New York Navigation Laws, § 89-a), and Reimer was in charge of navigating a flotilla with a combined gross tonnage of over 1800 (F 25). Furthermore, the rock in question is well charted, outside of the navigable channel and to the left of it for an upbound flotilla, Cf. 33 U.S.C. § 210 and 33 CFR § 80.10.

We submit that the foregoing are ample warnings not only to the mariner but also the owner that unlighted buoys may not be visible at night during periods of ice. An unlighted buoy on the left hand side is not intended to and does not engender any reliance for night navigation.

Yet, Reimer was looking only for an unlighted buoy on the left hand side of the channel when the shoreline was visible to him by eye and the chart clearly shows deep water almost right up to the easterly or right hand shore (see Reimer 139a, 170a; confirmed by Kiernan 417a; F 26; see chart Ex. 4).

Thus, there was no reliance engendered by the Government on buoy 25, there were various warnings not to rely solely on it and that it may be covered by ice. The only reliance was by the inexperienced Reimer because he was not aware of them due to his own fault (see F 37, 23a; Reimer 175a-177a).

The Government is not an insurer of safe navigation, the mariner must exercise some skill and prudence.

On page 6 of its brief Red Star states, without citing any reference that

"(Reimer) was looking for the buoy because, while he had determined that he was traveling east of the centerline of the River, he knew that he would have to maneuver to starboard before reaching the buoy * * * " [Emphasis supplied.]

We find no evidence in the record when and how Reimer "determined" that he was traveling east of the centerline of the river. He says he saw both shorelines, and so said Kiernan (Reimer 139a; Kiernan 417a), but significantly Reimer did not notice the Con Hook Light ahead (Reimer 196a-197a), although Kiernan saw it as

soon as he came up to the wheelhouse, when he also observed the buoy on the tug's starboard side (Kiernan 372a-374a).

Kiernan had no difficulty in navigating the flotilla from the point of striking to the Dayline Pier without any additional aids to navigation because this is not a specially difficult area. He testified on redirect.

"Q. * * * Do you consider that a bad spot in the river?

A. Myself, no, sir.

Q. Not to you?

A. Right." (Kiernan 437a-438a).

At this point it should be mentioned that there is no positive evidence about the can buoy 25 being obscured by ice. There is only evidence that Reimer looked and did not see it before the striking (Reimer 139a). While possibly a permissible inference, we point to the contradiction in the District Court's findings 33, 34 and 35, of which we quote applicable portions.

Finding 33:

"* * * After impact, Reimer sighted the buoy to the starboard *partially visible in the ice near the Vessels' wake*. He assumed that the barge and the tug in making the turn to starboard after the incident had freed the buoy from the ice." [Emphasis supplied.]

Finding 34:

"The buoy was obscured by ice and was not seen by Reimer as the Tug and Tow approached it. * * *"

In Finding 35, the Court, however, states that:

"Immediately after the casualty Kiernan was summoned and returned to the pilothouse. He saw the

lighted tower of Con Hook Island ahead and the '25' black can buoy about 50-75 feet off the starboard beam of the tug. The vessels were still on the northerly heading at the time * * *." [Emphasis supplied.]

These findings, of course, are not consistent. The wake is at the stern after the flotilla has passed over a particular spot, and "off the beam" is still forward of the stern. Thus, Kiernan saw the buoy before it reached the vessel's wake and Reimer may have seen it in the wake after the flotilla had been turned around by Kiernan and was heading southward, because, when Kiernan saw the buoy, the flotilla had not changed the direction of its northward travel (Kiernan 372a-376a; Cf. Reimer 145a-146a).

This may also explain why Reimer never saw the buoy and it leaves a strong inference that the buoy was not under ice. Rather, not noticing the Con Hook Light ahead, and probably erroneously believing that he was in the center of the river, or to the right of it, Reimer was directing his searchlight towards a supposed buoy somewhere off his port bow. Actually, due to his inexperience on the river, obvious misinterpretation of what he saw in the radar (the relative position of the Bear Mountain Bridge at the stern and Con Hook island ahead should show whether he was in the center of the river or to the right or left of it) and the failure to have any lookout who very likely could have reported the Con Hook Light ahead, Reimer was looking for the buoy in the wrong place (See Kiernan 410a-413a, 420a, 425a-426a; Cf. Reimer 168a and 190a-194a).

With a lookout reporting the Con Hook Light and with equipment to take bearings, as Captain Glass testified at 594a, a navigator could keep the Con Hook Light bearing 015° true or less and thus, avoid the rock (also see Hallock 477a; Ex. BB where the use of a danger bearing is explained).

We now turn to Red Star's claims of alleged inadequacy of the buoy, Red Star's references to claimed "numerous groundings" and the claim that additional or different aids to navigation should be installed.

The buoy was and is adequate

First of all, we contend that it is solely within the discretion of the Coast Guard whether to establish any aid to navigation and what type of an aid should be used. The reasonable exercise of this discretion, even if erroneous, is not actionable. See *Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976) where the "discretionary functions" exception in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), was held to apply to the Suits in Admiralty Act, 46 U.S.C. §§741-752.

There are many different waterways in the United States and there are many different aids to navigation and the choice for any particular type of an aid in any particular location is based on many considerations. There is the cost factor, the ecological considerations, the suitability of the aid, the frequency of traffic and requests for an aid by persons navigating the area (see Glass 519a-520a, 572a, 590a, 606a-610a, T469; Hallock 695a-699a, T736-T738, Cf. 480a-482a).*

With respect to the latter, the testimony is clear that there was never any request from any Hudson River pilot for a different aid in the area (Hallock 699a-701a, 765a-766a, 771a also see T723-T728, T730, T812-T813; Glass 609a-610a). The reference to a sectorized light at Con

* For a full discussion we request the Court to read Captain Glass' testimony between pages 527a-553a, 558a-576a, T469-T473, 576a, 578-584a, 595a-610a and Captain Hallock's testimony between pages T701-T742, T807-T835.

Hook following the grounding of the Cutter SAUK in 1963 was obviously resolved as not being necessary as none was installed. The reason for that was explained at the trial by Captains Glass and Hallock. Particularly, Captain Glass, eminently qualified in engineering, optics and aids to navigation (Glass 578a-582a), explained that a sector light would have an area where the two colors would overlap and the mariner would not know in what sector he was navigating. Also there is the possibility of having a false "danger" or "safe" sector (Glass 585a-587a; see Hallock 760a-766a).

Thus, Red Star's various quotations in its brief concerning the possibility of installing a sector light is really out of context. Of course, it is possible to install one, but the wisdom of doing so is something else, and, as we stated above, it is within the Coast Guard's discretion whether or not to do so, the exercise of which is not actionable.

Similarly, see Captain Glass' testimony as to the Coast Guard's experience with fixed lights on pile structures, either wooden or single 3 foot diameter steel pipes filled with concrete. They would be sheared by ice below the waterline creating a greater hazard (Glass T469-T473, 549a-550a, 575a-576a, 590a, 602a; Hallock 480a-482a).

Furthermore, there is evidence of a Coast Guard study to ascertain the feasibility of changing from buoys to beacons. The conclusions of the so-called Booze Allen study are contained in Exhibit 34 (Glass 531a-535a, 572a-576a, 581a). The study showed that it was not feasible to install fixed lights in areas of fresh water subject to heavy ice conditions, such as the Hudson River (Glass 573a-574a; see Glass T469).

Other arguments by Red Star asking for the building of a structure, the placing of additional aids on shore, or

removing the rock are, of course, areas where the exercise of discretion not to do so are not the basis of liability.*

With respect to the claimed "numerous other groundings" on page 13 of Red Star's brief, we respectfully point out that the 1963 SAUK grounding occurred with a fatigued crew after it had continually been breaking ice for 36 hours; and the 1969 SASSAFRASS grounding was due to an inexperienced young officer looking at the chart upside down and directing the helmsman to steer west of the buoy in daylight, with the buoy in plain view (See T377-T379 and F50). These were the only two incidents where all the surrounding circumstances were fully developed at trial. The evidence of the 1976 ROBERT POLING grounding was based on the report form submitted to the Coast Guard** (Ex. 35), and the development of the 1977 ETHEL H grounding referred to in Finding 53 was not permitted by the Court due to Red Star's objections (see Blomquist 323a and T144-T148). The 1973 GEORGE T. TILTON incident involved ice cover of 100% and again basically the owner's report plus two statements. See Ex. 26.

* We submit that Red Star's characterization of some of the testimony as "vague" or "inconclusive" as if implying some kind of impropriety at pages 26 and 27 of its brief is not only unfair when the entire testimony is read in context, but an attempt to set up some kind of smoke screen to get away from the negligent navigation and unseaworthiness of the flotilla. If references to particular testimony leave any doubt, we respectfully request that the entire trial testimony of captain Glass be reviewed (Glass T384-T474 and T483-T528).

** The questionability of the accuracy of all the information contained in such owner's or navigator's reports was shown by Ex. FF, the report submitted by Red Star in this case where it listed visibility as one half mile, where the evidence at trial showed it to be 2 miles (F26; F35; Kiernan 417a-418a; Cf. Ex. FF and Whiteley 657a-663a).

We respectfully submit that such evidence and such "history" is no basis for claiming negligence in maintaining an aid to navigation. It should not be overlooked that buoys, lights, charts, radar, bearing circles, etc. are aids to navigation that must be used together, prudently and with some skill,—a responsibility of the mariner and the owner who sends him there (Glass 606a-608a).

Also, the hundreds of thousands of other safe passages by other vessels and tug-barge flotillas militates against a need for a change.

Aside from the nearly half million safe passages in the area over a four year period tabulated in District Court's Finding 57, of which over 250,000 were tug-barge flotillas, the Coast Guard's records further show that in the month of February 1974, the same time that the OCEAN PRINCE's flotilla sustained the casualty, 384 such craft transited past that point,—an average of 12 per day. This is a low average month as in the summer months the average goes up to 28 such passages per day (Glass 570; Schwartz 747a-758a).

And most importantly, Red Star's own experienced navigator, Kiernan, did not consider the area "a bad spot in the river" (Kiernan 437a-438a).

Accordingly, the District Court's order dismissing Red Star's claims over against the United States should be affirmed, with costs to the United States.

II.

Red Star's other authorities distinguished.

The thrust of Red Star's argument is that the United States was negligent because additional aids on shore were not established to help a complete stranger in wa-

ters where prudence dictates the necessity for a qualified pilot, a fact that was published in the Coast Pilot (Ex. 3, p. 235). While sometimes Red Star speaks in terms of a system for aids to navigation in its argument,* in effect Red Star asks for a monument to stupidity. The adequacy and reasonableness of the can buoy, we submit, is demonstrated by references to the evidence in Point I *supra* and the authorities cited by Red Star, including some of its lengthy quotations, do not support such a proposition.

Red Star's authorities can basically be divided in three categories, off-station buoys, wreck or man made obstruction cases and channel maintenance cases.

Afran Transport Co. v. United States, 309 F. Supp. 650 (SDNY 1969), *aff'd.* 435 F.2d 213 (2d Cir. 1970), *cert. den.* 404 U.S. 872 (1971), dealt with a buoy off-station with no other available aids within three miles, see District Court's opinion, page 656. *Russell, Poling & Co. v. Conners Standard Marine Corp.*, 252 F.2d 167 (2d Cir. 1958), concerned a buoy off-station without proof of notice to the Coast Guard or how long it had been off-station, and the Government was exonerated. *Bouchard Transp. Co. v. Moran Towing & Transp. Co.*, 428 F. Supp. 153 (SDNY 1977), *aff'd.* on the opinion below, — F. 2d — (2d Cir. Docket No. 77-6069 1977), concerned a claim that a buoy on the left hand side of the channel, 50 feet off-station, caused the navigator to go outside of the channel on the right hand side, the Court finding that the stranding was due to errors in navigation and the Government was exonerated. *Richmond Marine Panama S.A. v. United States*, 350 F. Supp. 1210 (SDNY 1972) dealt with a buoy marking a turn in a dredged channel being off-station sufficiently to cause

* See pages 19, 22 of Red Star's brief.

the vessel to strike the edge when the pilot "close shaved" the buoy as a result of which both were held at fault. And, *Trinidad Corp. v. SS SISTER KATINGO*, 280 F. Supp. 976 (SDNY 1967) makes reference to a buoy being off-station but really dealt with the applicability of the "pilotage clause."

American Zinc Co. v. Foster, 313 F. Supp. 671 (S.D. Miss. 1970), modified 441 F.2d 1100 (5th Cir. 1971) *cert. den.* 404 U.S. 855 (1971) belongs to the buoy and underwater obstruction cases. With respect to the buoy being off-station the private maintainer of it had actual notice for some time prior to the casualty. In addition, the shipyard in violation of the building permit granted to it by the Army Engineers extended its slipway into the navigational channel beyond the point authorized, thereby creating an unauthorized obstruction in violation of the statute. Those were the basis of liability in that case and they have no relationship to the case at bar.

The *Complaint of tug HELEN B. MORAN, Inc.*, 560 F.2d 527 (2d Cir. 1977) also dealt with a statutory violation in that the bridge was constructed in violation of the building permit and that was the basis of liability.

Greer v. United States, 505 F.2d 90 (5th Cir. 1974) and *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951) dealt with the marking of a jetty and a wreck. In the *Greer* case there was evidence that the buoy often moved and that this could be prevented, and was prevented in other situations, by adding weights to the sinkers. However, this was not an ice area, as it dealt with the St. John's River, and, on page 92 that Court even stated that "adequate warnings may absolve the Coast Guard from liability in particular situations." It also involved two buoys being off-station and notice of this fact being given only with respect to one; we sub-

mit, a case that is inapposite. The *Somerset* case dealt with liability for improper marking for a wreck and the statutory duty to remove a wreck, again, we submit, not applicable.

Similarly, *Humble Oil & Ref. Co. v. Tug CROCHET*, 422 F.2d 602 (5th Cir. 1970), mainly deals with the statutory duty to mark and remove a wreck. See footnote 9 on page 607 noting that this case is really a part of the protracted litigation involving the question of owner's inability to limit liability with respect to the cost of removing a negligently sunk vessel in a navigable channel decided in *Wyandotte Co. v. United States*, 389 U.S. 191 (1967). In fact, when the case is read *in toto*, it militates against *Red Star*. There the barge owner merely gave an order to tie up barges because of anticipated high water but did not follow up whether or not this was done. The order was not carried out and a barge broke loose, sunk and was later struck by another flotilla resulting in chain reaction of casualties. The result was that the barge owner was denied limitation of liability. Also, the tug owner who placed an incompetent navigator in charge of the later flotilla that struck the then well known wreck was severely criticized. This is quite analogous to *Red Star* placing Reimer in charge of the navigation of the flotilla in the case at bar. If *Red Star* cites this case arguing some analogy between the duty to remove a sunken wreck and a natural existing rock outside of a navigable channel, we respectfully submit that *Red Star's* arguments are totally inapplicable.

On pages 22 and 23, *Red Star* quotes from *Canadian Pacific (Bermuda) Ltd. v. United States*, 534 F.2d 1165 (5th Cir. 1976) and *Guinan v. Boston, Cape Cod & New York Canal Co.*, 1 F.2d 239 (2d Cir. 1924). Both deal with maintenance of channels and, it appears that the *Canadian Pacific* case is cited mainly because it contains a quotation from the *Guinan* case. That case dealt with maintaining the Cape Cod Canal and an obstruction that

was not known of before the accident and was never discovered after the accident. Hence, no liability.

We respectfully submit that all the above cases have nothing to do with the issues at bar, other than possibly containing some quotations or some language, mostly dicta, that have been used by Red Star to make an argument to the effect that its negligence and the negligence of an inexperienced navigator, Reimer, should somehow be overlooked and forgiven and a contribution should be obtained from the United States.

We submit that this should not be permitted.

Lastly, we are surprised at Red Star citing *Burgess v. M/V TAMANO*, 373 F. Supp. 839 (D.C. Me. 1974) rev'd. 564 F.2d 964 (1st Cir. 1977), rehearing denied 1977 A.M.C. 1922 [not otherwise reported] petition for cert. denied sub nom *M/V TAMANO v. United States*, 46 L.W. 3600 (March 28, 1978). As far as applicable here, that case holds that a pilot of an ocean-going vessel is not a third party within the meaning of 33 U.S.C. § 1321(f)(1). 564 F.2d at pp. 981-982. By analogy that case states that the navigator of a tug pushing an oil barge is not a third party, and as he can not be separated from the tug, it and its owners too, are not third parties with respect to the oil spilling barge; hence, they operate as a whole unit and the limitation fund for clean-up costs under the statute can only be that of the entire flotilla and the end liability would be that of the barge owner or the tug owner to the United States for the gross tonnage of the entire flotilla. See Point II of the government's main brief.

We respectfully submit that the various authorities cited by Red Star are not grounds for imposing additional liability on the United States, and that the District Court properly dismissed Red Star's claims over against the United States.

CONCLUSION

This Court should affirm the District Court's dismissal of Red Star's claims over against the United States, with costs to the United States, and, it should hold Red Star fully liable for all the clean-up costs.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

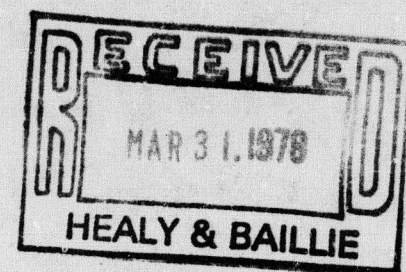
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